Supreme Court, U. S.
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No. 80-951

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

INDEPENDENT FEDERATION OF FLIGHT ATTENDANTS,

Petitioners,

vs.

TRANS WORLD AIRLINES, INC.,

Respondent,

and

ANN B. ZIPES, PATRICIA A. SANTINI, AND PAMELA J. DAILING, INDIVIDUALLY AND ON BEHALF OF A CLASS,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the District Court had the power to effectuate a settlement which compromised a bona fide question of law regarding jurisdiction.

II. Whether the Court of Appeals' decision became final or operative during a stay of its mandate, where the stay was granted in order to facilitate settlement negotiations.

III. Whether an adequate basis existed for the District Court's approval of the settlement, independent of one of the settled cases, in light of the absence of any issue of jurisdiction in the other of the two settled cases.

IV. Whether a seniority remedy was barred solely because it affects seniority rights under a labor agreement.

V. Whether the District Court's order granting seniority to Title VII victims was an abuse of discretion where:

   A. There are 172 persons for whom seniority relief was ordered, compared with almost 7,000 incumbents;

   B. The seniority relief was not shown to have an adverse unusual impact upon the union members; and

   C. The union did not show that any facts or circumstances exist which are not generally found in Title VII cases.

VI. Whether the union's own inconsistent conduct, in first declaring that jurisdiction exists and then later asserting the opposite, estops the union from asserting a lack of jurisdiction.

TABLE OF CONTENTS.

		PAGE
Questions Presented		i
Table of Authorities		iii
Counter-Statement of the Case		1
A.	The Filing of the Suit by the Union; the 1972 Settlement	1
B.	The Filing of a Second Suit Against TWA by the Same Class	3
C.	The District Court's Ruling on the Merits; TWA's Interlocutory Appeal	3
D.	The Settlement with TWA	5
Summary of Argument		7
Reasons Why the Writ Should Not Be Granted		8
I.	The Power of a District Court to Approve the Settlement Does Not Present an Issue Worthy of Review by this Court	8
	A. The District Court Had the Power to Implement the Compromise Settlement	8
	B. The Earlier Decision of the Court of Appeals Did Not Become Binding on the District Court	9
	C. The Union Had a Limited Interest Which Was Fully Protected	10
	D. There Is No Conflict Between the Circuits on the Issue at Hand	11
II.	The Award of Retroactive Seniority Does Not Impermissibly Infringe on the Rights of Incumbent Union Members	12
	A. There Has Been a Finding of a Violation	12
	B. A Court-Ordered Remedy Under § 706(g) Supersedes the Seniority Rights Existing Under a Labor Agreement	12
	C. The District Court's Grant of Relief Under § 706(g) Was Clearly Within Its Discretion	12
III.	The Union's Own Conduct Bars It from Denying Jurisdiction	13
Conclusion		15

TABLE OF AUTHORITIES.

Cases.

PAGE

Air Line Stew. & S. Ass'n, Local 550 v. *American Airlines, Inc.*, 490 F. 2d 636 (7th Cir. 1973), *cert. denied sub nom. Air Line Stewards & Stewardesses Ass'n, Local 550* v. *Zipes*, 416 U.S. 993 (1974) 2, 3, 14

Air Line Stewards, Etc. v. *American Airlines, Inc.*, 573 F. 2d 960 (7th Cir. 1978), *cert. denied* 439 U.S. 876 (1978) 4, 9, 10

Alger v. *Hayes*, 452 F. 2d 841 (8th Cir. 1972) 14

Alphin v. *Henson*, 552 F. 2d 1033 (4th Cir. 1977) .. 9

Aro Corp. v. *Allied Witan Co.*, 531 F. 2d 1368 (6th Cir. 1976) 9

Bailey v. *Henslee*, 309 F. 2d 840 (8th Cir. 1962) 9

Cohen v. *Beneficial Loan Corp.*, 337 U.S. 541 (1949) 13

In re Consolidated Pretrial Proceedings in the Airline Case, 582 F. 2d 1142 (7th Cir. 1978), petitions for *cert.* pending, (Docket Nos. 78-1545 & 78-1549) 4

Di Frischia v. *New York Central R.R.*, 279 F. 2d 141 (3rd Cir. 1960) 14

In Re Double D Dredging Co., 467 F. 2d 468 (5th Cir. 1972) 14

EEOC v. *American Tel. & Tel. Co.*, 556 F. 2d 167 (3rd Cir. 1977) 10

Florida Trailer & Equipment Co. v. *Deal*, 284 F. 2d 567 (5th Cir. 1960) 8

Franks v. *Bowman Transportation Co.*, 424 U.S. 747 (1976) 12, 13

McArthur v. *Southern Airways*, 556 F. 2d 298 (5th Cir. 1978) 11, 14

McArthur v. *Southern Airways*, 569 F. 2d 276 (5th Cir. 1978) 11

PAGE

Patterson v. *Stovall*, 528 F. 2d 108 (7th Cir. 1976). 8
Scarano v. *Central R. Co. of New Jersey*, 203 F. 2d 510 (3rd Cir. 1953) 14
Smith v. *Montgomery Ward & Co.*, 388 F. 2d 291 (6th Cir. 1968), *cert. denied*, 393 U.S. 871 (1968) 14
United Airlines v. *Evans*, 431 U.S. 553 (1977) 8

Statutes and Rules.

§ 706(d) of the Civil Rights Act of 1964 (1970) 8, 10, 11
§ 706(f) of the Civil Rights Act of 1964 (1970) 10
§ 706(g) of the Civil Rights Act of 1964 (1970) 4, 5, 12
Rule 23(e), F.R.C.P. 5, 9
Rule 23(c)(2), F.R.C.P. 14
42 U.S.C. § 2000e-3(a) 3
28 U.S.C. § 1292(b) 3

Other Authorities.

Stephens, *Federal Jurisdiction by Estoppel*, 68 Dickinson L. Rev. 39 (1963) 14

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COUNTER-STATEMENT OF THE CASE

A. The Filing of the Suit by the Union; the 1972 Settlement

For many years prior to 1970, TWA and American Airlines fired any hostess who became pregnant or adopted a child. During 1970, the hostesses' union[1] (whose membership

[1] As used herein, the word "union" denotes the Petitioner (IFFA) and its predecessor unions which represented the same constituencies of airline hostesses.

no longer included the previously fired hostesses) was negotiating a new labor agreement. One of the issues being negotiated concerned the "no-mothers" policy. In August 1970, during these negotiations, the union filed this case on behalf of a class of all currently employed hostesses and all previously fired hostesses.[2] The union's complaint alleged that the policy violated the Civil Rights Act of 1964 ("the Act") and that the court had jurisdiction over all of the claims of both groups. Thereafter, the new labor agreement eliminated TWA's "no-mothers" policy for the future. The union then entered into a settlement with TWA which gave the previously fired hostesses the right to become reemployed as openings occurred, but without back pay or retroactive seniority. In March 1972, the District Court approved the settlement under Rule 23, F.R.C.P.

Several objecting class members appealed. The Seventh Circuit reversed. *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines,* 490 F. 2d 636 (7th Cir. 1973), *cert. denied,* 416 U.S. 993 (1974).[3] The cases were remanded with instructions to eject the union as the class representative, because of the conflict between the interests of the incumbent union members in retaining their seniority and the interests of the previously fired hostesses in regaining their seniority. The Seventh Circuit held that once the union members had attained their goal of rescinding the "no-mothers" policy:

> "... [the union members] had little further interest in the action, except for such interest as the junior among them would have adverse to the reinstatement of previously discharged stewardesses." 490 F. 2d at 638

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[2] A separate suit was concurrently filed against American Air Lines, which was consolidated with the *TWA* case.

[3] This was the second appeal in this case. The first appeal reviewed the denial of the EEOC's motion for leave to intervene to challenge the union's settlement.

The Seventh Circuit also chastised the union for failing to consult the other named plaintiffs about the proposed settlement (490 F. 2d at 638, 640) and for not even notifying the class members of their rights to opt-out (*Id.* at 642-643).

B. The Filing Of A Second Suit Against TWA By The Same Class

During the pendency of that appeal, the union entered into an agreement (without court approval) pursuant to which TWA reemployed only those class members who disassociated themselves from the pending case and the pending appeal. A timely EEOC charge was filed which alleged that this second agreement violated 42 U.S.C. § 2000e-3(a).[4] After the EEOC proceeding ran its course, in July 1974 the plaintiff class filed a new suit in the District Court, concerning which no dispute over jurisdiction has ever existed.[5] The cases were consolidated. Substantial discovery was completed but inasmuch as the relief overlapped the earlier case, the District Court permitted the second case to lay dormant, awaiting the outcome of the earlier case.

C. The District Court's Ruling On The Merits; TWA's Interlocutory Appeal

In April 1976, summary judgment was entered for the plaintiff class against TWA and American in the earlier cases. In 1976, the airlines for the first time raised the question of timely filing of EEOC charges, in a motion to exclude some of the class members from the case. In October 1976, the District Court rejected those motions. TWA and American took an interlocutory appeal from the two District Court orders under 28 U.S.C. § 1292(b).

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[4] 42 U.S.C. 2000e-3(a) makes it unlawful for an employer to discriminate against any employee because she has made a charge or participated in a proceeding or suit against the employer.

[5] This is the case to which the Petitioner refers when it states that "we need not mention the 'second suit' again". (Petn. 4, n.3)

While the appeal was pending, American settled with the class. American agreed to pay $2.7 million, reinstate the previously fired hostesses and leave the question of seniority to the District Court under § 706(g) of the Act (1970). The union intervened. Over the union's objections, and after an evidentiary hearing, the District Court granted retroactive seniority to the reemployed class members. The union appealed. In March 1978, the Seventh Circuit affirmed. *Air Line Stewards, Etc.* v. *American Airlines, Inc.*, 573 F. 2d 960 (7th Cir. 1978)[6] The union's petition for certiorari was denied. 439 U.S. 876 (1978).

In August 1978, the Seventh Circuit ruled on TWA's interlocutory appeal from the summary judgment and the class order. The summary judgment was affirmed on the Seventh Circuit's determination that the "no-mothers" policy violated the Act. *In re Consolidated Pretrial Proceedings in the Airline Cases*, 582 F. 2d 1142 (7th Cir. 1978).[7] But the class order was reversed, in part, as to those previously fired hostesses who had not filed timely EEOC charges. 582 F. 2d at 1150-1151. The Seventh Circuit rejected the plaintiffs' arguments of waiver, estoppel and TWA's failure to plead its timeliness defense, on the ground that timely compliance with the EEOC filing requirement is jurisdictional. 582 F. 2d at 1151-1152. On account of ongoing settlement negotiations, at the request of the parties the mandate was stayed. The stay of the mandate has remained in effect continuously.

The plaintiff class petitioned this Court for certiorari to review the Seventh Circuit's ruling regarding jurisdiction. (Docket No. 78-1545). TWA cross-petitioned to review the determination of the merits. (Docket No. 78-1549).

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[6] This was the third appellate opinion in this case.

[7] This was the fourth appellate opinion in this case.

D. The Settlement With TWA

While the petitions for certiorari were pending, a settlement agreement was reached. The plaintiff class and TWA filed a joint motion to defer this Court's determination on whether to grant certiorari. By this Court's Order dated June 4, 1979, that motion was allowed so as to give the parties the time to finalize the settlement under Rule 23, F.R.C.P.

Along the lines of the settlement agreement in the *American* case, TWA agreed to pay a total of $3 million to the class ($1.5 million to each of the two subclasses),[8] reinstate those previously fired hostesses who desire reemployment, and leave the seniority question to the District Court under § 706(g).

The union was given notice of the seniority hearing, whereupon it intervened to resist the restoration of seniority. At the evidentiary hearing on the seniority question, it was established that there were 6,963 incumbent hostesses, as against only 172 members of Sub-class B who sought reemployment. The District Court approved the settlement and ordered the restoration of retroactive seniority for the reemployed class members. Under the District Court's order, reemployment is available only where a vacancy exists, so that no incumbent can be forced out of her job (or even be required to transfer to a different TWA base) in order to make room for a returning mother. Although it is possible that a previously furloughed incumbent may have to await recall until after a returning mother is rehired, that can happen to only the most junior incumbents, i.e., hostesses who had not even been hired as of the date of the settlement agreement. Regarding that hypothetical possibility, TWA's Vice-President testified:

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[8] Sub-class A is comprised of those (approximately 40) class members who filed timely EEOC charges. Sub-class B is comprised of the class members whose claims, just before the settlement, depended upon reversal of the Seventh Circuit's decision.

"... you are speculating about some girl that is going to high school in Kansas today, who may be hired two years from now."

The union appealed, which resulted in the Seventh Circuit's affirmance[9] from which the union now seeks certiorari.

[9] This decision marks the fifth appeal in this case.

SUMMARY OF ARGUMENT

Where the issue of jurisdiction poses a bona fide question of law, a District Court has the power to implement a settlement in which both sides compromise on that question. At any rate, this does not present an issue worthy of review by this Court. The Fifth Circuit did not address this issue and there is no conflict between the Circuits.

The settlement embraced *two* cases. In only one of those two cases was there an issue of timely filing as to some of the class members; and even in that case, the court had jurisdiction over *the case*. In the other case, there has never been an issue of jurisdiction.

Because the mandate of the Seventh Circuit was stayed, its opinion regarding jurisdiction did not prevent the District Court from effectuating the parties' compromise settlement.

As the union admitted, it never had standing to prevent TWA from compromising on the legal question of jurisdiction. The union's limited interest in the seniority question was fully and properly adjudicated.

The grant of seniority was clearly within the discretion of the District Court. The union failed to show any "unusual adverse impact". In fact, its effect upon the incumbents is *de minimus*.

The union's prior conduct in the case estops it from asserting a lack of jurisdiction.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I.

THE POWER OF A DISTRICT COURT TO APPROVE THE SETTLEMENT DOES NOT PRESENT AN ISSUE WORTHY OF REVIEW BY THIS COURT

A. The District Court Had the Power to Implement the Compromise Settlement

When the parties agreed to settle this case, the plaintiff class had prevailed on its substantive claims, and TWA had prevailed on its challenge to the scope of the class. However, neither victory had reached a final adjudication. With the filing of cross-petitions for writs of certiorari by both sides, the lawsuit was in a procedural posture which the Seventh Circuit aptly described as a "winner take all contest". (App. 8a)[10] Neither side desired to risk such a contest.[11] With leave of this Court, disposition of the petitions for certiorari was stayed, and the parties negotiated a settlement which has been approved by the District Court and the Court of Appeals.

The Seventh Circuit was plainly correct in enforcing the well-settled policy of encouraging settlements. (App. 6a) See also *Patterson* v. *Stovall*, 528 F. 2d 108, 114 (7th Cir. 1976); *Florida Trailer & Equipment Co.* v. *Deal*, 284 F. 2d 567, 571 (5th Cir. 1960). The Seventh Circuit aptly noted that:

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[10] Citations of "App. ____" refer to Petitioner's Appendix.

[11] As observed by the Seventh Circuit, the "jurisdictional" issue has not been addressed by this Court. (App. 7a) Contrary to the union's contention (Petn. 17-18), in *United Air Lines* v. *Evans*, 431 U.S. 553 (1977), this Court did not rule that failure of timely compliance with § 706(d) deprives a court of subject-matter jurisdiction. There, the plaintiff recognized that it was too late to complain of the earlier violation. 431 U.S. at 558. This Court simply held that perpetuation of the effects of the facially neutral seniority system did not comprise a new violation.

> "Where, as here, the jurisdictional question is not settled with finality, parties should not be forced to litigate the issue of jurisdiction if they can arrive at a settlement . . . ." (App. 9a)

As was held in *Aro Corp.* v. *Allied Witan Co.*, 531 F.2d 1368, 1371 (6th Cir. 1976):

> "Even in those instances in which the court's original jurisdiction may have been questionable, it has jurisdiction over settlement agreements, the execution of which renders the prior controversy academic."

The Seventh Circuit had reached the same conclusion in the third appeal in this case, in which the union challenged the settlement in the *American Airlines* case. *Airline Stewards, Etc.* v. *American Airlines, Inc.*, 573 F.2d 960, 963 (7th Cir. 1978), *cert. denied*, 439 U.S. 876 (1978). There is no reason why parties to a lawsuit may not negotiate a settlement when one of the issues is that of jurisdiction.

B. The Earlier Decision of the Court of Appeals did not Become Binding on the District Court

The mandate of the Seventh Circuit was stayed to allow a settlement of the controversy. Absent a mandate, the decision of the Seventh Circuit was neither final nor operative. Cf. *Bailey* v. *Henslee*, 309 F.2d 840, 844 (8th Cir. 1962); *Alphin* v. *Henson*, 552 F.2d 1033 (4th Cir. 1977). When the parties returned to the District Court to present their settlement for approval under Federal Rule 23(e), the District Court was free to act in accord with its prior decision, which had held that it had jurisdiction over all of the claims and that the airlines' defense of untimely EEOC filings was unavailing.

C. The Union Had a Limited Interest Which Was Fully Protected

As a third party with only a peripheral interest in the case, the union is obviously not an intended beneficiary of the time filing requirements of § 706(d). Where the employer gives up its right to a defense thereunder, the union has no right to intrude itself and insist that the employer's timeliness defense be litigated to the end. Accordingly, the union's interest must be limited to the extent of the *remedy* to be imposed. *Air Line Stewards, Etc.* v. *American Airlines,* 573 F.2d 960, 964; *EEOC* v. *American Tel. & Tel. Co.,* 556 F.2d 167, 173 (3rd Cir. 1977).[12]

Nor can the union bootstrap itself into a position of standing by asserting that "subject-matter jurisdiction" is absent. Even assuming that Congress intended the time-filing requirements of § 706(d) to be invulnerable to the equitable doctrines to which ordinary statutes of limitations are subject, it stretches that reading of Congress' intention too far to conclude that the failure to file EEOC charges on time deprives a federal court of "subject-matter jurisdiction". Section 706(f) is the only portion of the Act which addresses jurisdiction. It states:

> "Each United States district court . . . shall have jurisdiction of actions brought under this title."

It is manifestly unfair for the third-party union to insist that the settlement be ignored and that the bona fide question of law involved in the employer's personal defense be litigated to the bitter end. The union's only interest in the case—the question of seniority—was resolved by the Court at an adversary hearing.

The Seventh Circuit's decision upholding the power of the District Court to approve the settlement in this case provides no issue worthy of review in this Court.

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[12] In its initial objection to the awarding of seniority, the union acknowledged that it "has no standing to object and indeed does not object" to the other aspects of the settlement.

D. There Is no Conflict Between the Circuits on the Issue at Hand

The assertion of a conflict between the Seventh Circuit and the Fifth Circuit misapprehends *McArthur* v. *Southern Airways,* 569 F. 2d 276 (5th Cir. 1978), which was the second of two opinions in the same case.

In *McArthur,* the defendant recanted its earlier decision to settle and then moved to dismiss on the ground of plaintiffs' having failed to file timely EEOC charges. *McArthur* v. *Southern Airways,* 556 F. 2d 298, 300 (5th Cir. 1978). The motion was denied in the District Court. *Id.,* at 301. An appeal was taken regarding the adequacy of the settlement. Defendant cross-appealed on the point that its motion should have been allowed. *Id.,* 301 and 301 (n.6). Without considering that point, the Fifth Circuit reversed on the grounds presented by the plaintiff-objectors.

In a second opinion, the Fifth Circuit considered the defendant's argument for the first time and dismissed the case on the ground that the defendant's motions should have been granted. 569 F. 2d at 278. In this holding, the Fifth Circuit was in accord with the Seventh Circuit. But the Fifth Circuit did not rule on whether a District Court has jurisdiction over a settlement where the settling parties compromise on the issue of whether § 706(d) relates to subject-matter jurisdiction; *that* question was *not* before the Court in *McArthur.* There is no conflict between the Circuits on the narrow point involved here.

In addition, as the union concedes (Petn., 9, n. 11; 19, n. 15) the untimeliness argument only applies to *some* of the class members. Unlike *McArthur,* in this case there is no question that the court had jurisdiction over the *case.*

II.

THE AWARD OF RETROACTIVE SENIORITY DOES NOT IMPERMISSIBLY INFRINGE ON THE RIGHTS OF INCUMBENT UNION MEMBERS

A. There Has Been a Finding of a Violation

In some other case, an issue might arise over whether seniority relief is appropriate in the absence of a finding of a violation, i.e., where the violation is established only through a settlement.[13] But here the District Court's Order granting summary judgment expressly found that TWA had committed a violation (App. 41a), which was affirmed by the Seventh Circuit. (App. 48a)

B. A Court-Ordered Remedy Under § 706(g) Supersedes the Seniority Rights Existing Under a Labor Agreement

The District Court's Order granting retroactive seniority to reemployed class members does not tamper with the seniority system provided in the labor agreement. It merely credits returning employees with the time which they lost as a result of TWA's violation. That relief was completely consistent with this Court's holding that employee expectations arising from a seniority system must yield to relief under § 706(g). *Franks* v. *Bowman Transportation Co.*, 424 U.S. 747, 779 (1976).

C. The District Court's Grant of Relief Under § 706(g) Was Clearly Within Its Discretion

Under the rule laid down by this Court in *Franks*, it was the union's burden in the District Court to demonstrate that seniority relief would have an "unusual adverse impact arising from facts and circumstances that would not be generally found

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[13] Acceptance of the union's argument would mean that there could never be a settlement of the liability aspects of a Title VII case.

in Title VII cases". 424 U.S. at 780 (n.41). The District Court conducted an evidentiary hearing on the seniority question, and found that the union failed to show any unusual adverse impact or any facts or circumstances not generally found in Title VII cases. (App. 9a-10a) The evidence showed that: (1) no class member's return to work would displace any incumbent, (2) only 172 members of Subclass B are eligible for reemployment, to be slotted into a seniority system which has a work force of 6,963 incumbents and (3) the miniscule amount of seniority which the incumbents will share with the class members came about in the first place only because of the unlawful deprivations which were suffered by these class members (and others who were fired but who will not return to work).[14]

III.

THE UNION'S OWN CONDUCT BARS IT FROM DENYING JURISDICTION.

When this case began, the union was on the plaintiffs' side. At that time, the union alleged that the District Court had jurisdiction over *all* of the claims, thus using the threat of recovery for the past victims in order to further its own negotiating goals. As soon as the union obtained rescission of the "no-mothers" policy in the future, it entered into the settlement agreement which abandoned the rights of the past victims (the non-union members). When the ejection of the union eventually led to a settlement which was of real value to the previously fired hostesses, the union did an about face and became the foe of the class. A class representative owes a fiduciary duty to the class members. *Cohen* v. *Beneficial Loan Corp.*, 337 U.S. 541, 549 (1949). His use of the class suit to

[14] At the evidentiary hearing, the union's officer admitted that "any woman who will be junior to a returning class member will be . . . no worse off than if the returning class member had never been illegally fired in the first place".

enhance his own individual bargaining position is intolerable. *McArthur* v. *Southern Airways,* 556 F. 2d 298, 303 (5th Cir. 1977), vacated on other grounds, 569 F. 2d 276 (1978).

In reversing the District Court's approval of the 1972 sellout settlement, the Seventh Circuit appropriately chastised the union for, among other things, failing to consult the named plaintiffs about the proposed settlement and acting in a position of a clear conflict of interests. *Air Line Stew. & S. Ass'n, Local 550* v. *American Airlines, Inc.,* 490 F. 2d 636, 638, 640 (7th Cir. 1973), *cert. denied sub nom Air Line Stewards & Stewardesses Ass'n, Local 550* v. *Zipes,* 416 U.S. 993 (1974). As part of its shabby performance, the union did not even notify the class members of their Rule 23(c)(2) opt-out rights. 490 F. 2d at 642-643.

Although the Seventh Circuit did not find it necessary to address this argument, ample authority exists to estop the union from taking this position. See, e.g., *Alger* v. *Hayes,* 452 F.2d 841 (8th Cir. 1972); *In Re Double D Dredging Co.,* 467 F. 2d 468 (5th Cir. 1972); *Smith* v. *Montgomery Ward & Co.,* 388 F.2d 291 (6th Cir. 1968), *cert. denied,* 393 U.S. 871 (1968); *Di Frischia* v. *New York Central R.R.,* 279 F.2d 141 (3rd Cir. 1960); *Scarano* v. *Central R. Co. of New Jersey,* 203 F.2d 510, 512-513 (3rd Cir. 1953); Stephens, *Federal Jurisdiction by Estoppel,* 68 Dickinson L. Rev. 39 (1963).

Because of its attempts to play "fast and loose" with the courts, see *DiFrischia, supra,* the union should be estopped from asserting a lack of jurisdiction or otherwise challenging the settlement.

CONCLUSION

The District Court had the power to recognize and effectuate the compromise regarding the legal question of jurisdiction, particularly inasmuch as the Seventh Circuit's mandate had been stayed. In any event, the settlement agreement rests on the ample jurisdictional foundation of one of the two settled cases (and at least part of the other settled case).

The grant of seniority was not an abuse of the District Court's discretion. The union is estopped from asserting the absence of jurisdiction. There is neither a conflict between the circuits nor an issue of sufficient importance to justify review in this Court.

The writ should not be granted.

Respectfully submitted,

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